



STATE OF INDIANA

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May 13, 2009

Richard Butler
310 West High Street
Lawrenceburg, Indiana 47025

Re: Informal inquiry 09-INF-17 regarding Lawrenceburg Community School Corporation

Dear Mr. Butler:

This advisory opinion is in response to your informal inquiry dated April 23, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write to inquire about records maintained by the Lawrenceburg Community School Corporation ("Corporation") related to school construction and renovation. Pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3), the Corporation is a public agency. *See* I.C. § 5-14-3-2(m)(2)(A). Your inquiry is whether the Corporation violated the APRA by denying you access to records pertaining to demolition or renovation plans for Lawrenceburg High School ("LHS").

BACKGROUND

You sent a letter dated January 14, 2009 to the Corporation wherein you requested copies of a number of records related to the Corporation's building and renovation plans. You received a letter on February 6 wherein the Corporation indicated it would provide copies of two records and was reviewing records to determine which might be responsive to your request. You sent another letter to the Corporation wherein you expressed your dismay with the timing of the response. You received a subsequent letter on February 9. In that letter, the Corporation denied you access to a record pertaining to the Corporation's plans and cost estimates to remodel part of LHS. You contend that the record should be made available. You base this contention on the expenditure of public funds to pay for the estimate and creation of other related documents.

The Corporation responded to the inquiry by letter dated May 7 from Lisa deHart Lehner. The Corporation contends the expenditure of public funds does not determine whether a record is disclosable under the APRA. The Corporation contends it has provided you copies of certain requested records but has denied access to one record

regarding a hypothetical academic wing. The Corporation contends that record is excepted from disclosure on the basis of I.C. § 5-14-3-4(b)(6), as it is an intra- or interagency record consisting of advisory or deliberative material. Further, the record expresses opinion and includes speculative information communicated to the Board for the purpose of making a decision. The Corporation indicates that the Board has not yet deliberated or discussed the matter.

The Corporation goes on to further describe the record, contending it contains speculative opinions and advice from a professional service provider regarding recommended space needs, estimated costs associated with suggested structural changes to LHS and suggested specifications for changes to the building. The Corporation contends that if the Board decides to deliberate on the matter, it will need this type of opinion and advice. The Corporation contends that without this type of record, the Board could not begin to speculate about what should be done.

You sent to my office a subsequent letter, dated May 12. You contend the Corporation has shared the requested record with other public officials. Further, you provide some opinions regarding schools and building projects.

ANALYSIS

The public policy of the APRA states, "[p]roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. The Corporation is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m)(2)(A). Accordingly, any person has the right to inspect and copy the public records of the Corporation during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA provides that at the discretion of the agency, the following (among others) may be withheld from disclosure:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

I.C. § 5-14-3-4(b)(6).

The Corporation contends it has provided you access to all records responsive to your request except one record. The Corporation contends that record is excepted from disclosure on the basis of the deliberative materials exception, I.C. § 5-14-3-4(b)(6). You contend that because the record was created by expenditure of public funds, it is subject to disclosure under the APRA. The APRA does not contain a provision which ties disclosure to expenditure of funds. Instead, the APRA generally provides that any person

has the right to inspect and copy the public records of a public agency unless the records are excepted from disclosure under the APRA. *See* I.C. § 5-14-3-3(a).

When denying access to a record, the Corporation is required to provide a statement of the specific exemption(s) authorizing the withholding of all or part of the record. I.C. § 5-14-3-9(c). If the matter is brought to court, the Corporation bears the burden of proof to sustain the denial of access. I.C. § 5-14-3-9(f). In court, the Corporation would meet its burden of proof not by relying on a conclusory statement (e.g. “the record is deliberative material”) but by establishing the content of the record with adequate specificity. I.C. § 5-14-3-9(f).

Here, the Corporation in its February 9 letter to you did provide a statement of the specific exemption authorizing the withholding of the record. Namely, the Corporation cited the deliberative materials exception. The Corporation did not provide detail establishing the content of the record, nor was it required to do so. In its response to your April 23 inquiry, the Corporation has provided more detail regarding the record. As the Corporation describes it, the record at issue expresses opinion and includes speculative material. It was created for the purpose of assisting the Board in deliberating and making decisions regarding the renovations. Nothing in the APRA provides that the decision for which the record is communicated must be made within a certain period of time nor under review at the time of the creation of the record. Based on the Corporation’s description of the record at issue, it is my opinion the Corporation would be able to meet the burden if the matter were brought to court.

Finally, you contend the Corporation has shared information contained in the record with other persons. As I just received this correspondence from you yesterday, the Corporation has not been afforded the opportunity to respond. But the APRA provides the Corporation the discretion whether to provide access to the deliberative material. I.C. § 5-14-3-4(b)(6). So long as the Corporation did not act in an arbitrary and capricious manner in denying you access to the record, the Corporation did not violate the APRA by providing some or all of the information contained in the record to some public officials but denying you access to the record. *See* I.C. § 5-14-3-9(g)(2).

For the foregoing reasons, it is my opinion the Corporation has not violated the Access to Public Records Act.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Lisa deHart Lehner, Wood & Lamping, LLP
R. Stephen Gookins, Lawrenceburg Community School Corporation